No. 95-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
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C. KEITH SCHAFER, JOHN TWIEHAUS, ROBERT O. MUETHER, JACQUELINE HOWARD, KELLY SHAW, AND PEGGY DUNLAP,
Petitioners,

v.

WAYNE AND ALICE KENNEDY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATES OF ALABAMA, FLORIDA, HAWAII, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, AND SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The states of Alabama, Florida, Hawaii, Nevada, North Carolina, North Dakota, Oklahoma, and South Dakota respectfully submit this brief as amici curiae in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.[1] The brief is submitted to emphasize to the Court the broad expansion of substantive due

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[1] The defendants in this case, state-employed mental health officials, filed a Petition for Writ of Certiorari ("Petition") on April 19, 1996. Under Rule 37.4, consent of the parties is not required to file this brief because it is submitted on behalf of the states of Alabama, Florida, Hawaii, Nevada, North Carolina, North Dakota, Oklahoma, and South Dakota by the Attorneys General of those states.

process rights that could follow in the wake of the Eighth Circuit's unprecedented decision and the possible effects the decision could have on policy issues that are properly left to the states.

The analysis employed by the Eighth Circuit in holding that a voluntary mental health patient who harmed herself was entitled to substantive due process protection is inconsistent with this Court's decisions regarding the existence of such constitutional rights. In relying on the analysis to break new ground in the field of substantive due process rights, the Eighth Circuit has exalted mere words of expression over affirmative actions, thereby giving states disincentive to enact statutes and policies that provide for the welfare of their citizens. The short-term benefits of the decision that might accrue to the plaintiffs pale in comparison to the long-term consequences to provision of state services that could follow. Compounding these effects of the decision is the Eighth Circuit's denial of qualified immunity because reasonable state officials at the time of the events giving rise to this case would have known that its chain of reasoning was "not obscure." The defense of qualified immunity will be empty words if state officials untrained in the law are held responsible for anticipating the existence of rights that are based on such reasoning.

Because the above-listed states share an interest in providing important state services to their citizens without the stifling effect of liability for constitutional violations based on words and not actions, they respectfully urge this Court to grant the Petition for Writ of Certiorari, and to reverse the decision below.

I.

The Eighth Circuit's unprecedented decision that liability for a substantive due process violation can exist in the absence of affirmative state action creates disincentive for states to provide for the welfare of their citizens.

As individuals, governmental bodies, and other entities know all too well, important decisions must constantly be made regarding the best and most efficient ways to allocate resources. State governments must consider many factors when deciding whether the benefits of a particular expenditure sufficiently outweigh its costs. The Eighth Circuit relied on an improper analysis to add to this mix the specter of liability under the federal constitution based only on the existence of a state law that provides for mental health services to citizens of Missouri.

A. The Eighth Circuit's departure from established due process jurisprudence expands the limits of substantive due process protection beyond that which has been recognized by this Court.

The Eighth Circuit instructed that on remand, it should be determined whether the mental health facility "could" have detained the patient if her parents had requested a release. Petition at A-7. Reliance on such unexercised discretion, however, is a drastic departure from what this Court has stated is the fundamental limitation placed on states by the due process clause -- the power to act. *DeShaney v. Winnebago Cty. Dep't Soc. Servs.*, 489 U.S. 189, 195 (1989). Further recognizing this fundamental principle, this Court held that a

state's affirmative duty under the due process clause is a result of the state's limitation of a person's freedom to act, not merely on knowledge of the person's predicament or the state's expression of intent to help. *Id.* at 200. Thus, it is a state's affirmative act of restraint that triggers the protections of the due process clause. *Id.*

This Court recently reemphasized that it is a state's actions that is the proper focus of an analysis as to whether a constitutionally protected right exists. In *Sandin v. Conner*, __ U.S. __, 115 S. Ct. 2293, 2300 (1995), the Court held that liberty interests protected by the due process clause are created by "atypical and significant" deprivations. The Court rejected an analysis that relied on an examination of the particular language of a statute, but that is the very analysis that the Eighth Circuit engaged in. Review by this Court would clarify the proper analysis for determining when protected constitutional rights are created.

B. Under the Eighth Circuit's analysis, the nature of substantive due process rights will vary from state to state.

As a result of its analysis, the Eighth Circuit created a previously unrecognized basis for constitutional liability based on criteria that would vary from state to state. The Petition identified forty-two states besides Missouri that place conditions on a voluntary patient's right to leave a treatment facility. Petition at n.3. Under the Eighth Circuit's analysis, however, it is not the mere existence of these statutes that defines the nature of the substantive due process right. Instead, it is the particular language of each statute that would determine when such a right would be triggered. Even though a substantive due process right might exist under the Eighth

Circuit's analysis in each of these states, the particular circumstances under which it would arise would not be uniform.

In Missouri the right would be created (according to the Eighth Circuit's opinion) at the moment a patient was "mentally disordered and presents a likelihood of serious physical harm to himself or others." Mo. Rev. Stat. §632.155. In Arkansas, the right would be triggered if the patient possessed a "clear and present" danger to himself or others. Ark. Stat. Ann. §20-47-204(2) and 20-47-207(c). In North Carolina, the right would arise if the patient is mentally ill and dangerous to himself or others, mentally retarded with an accompanying behavior disorder rendering him dangerous to others, or a substance abuser who is a danger to himself or others. N.C.G.S. §§ 122C-211(b) and 122C-212(b).

If followed, the Eighth Circuit's analysis would lead to a patchwork pattern across the country of substantive due process rights. That result would be inconsistent with this Court's statement that substantive due process rights are found after the exercise of "the utmost care." *Reno v. Flores,* 507 U.S. 292, 302 (1993), *citing Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The result also could lead states to change the way they provide important services to their citizens because of the liability they could incur by doing so.

C. Allowing substantive due process rights to be created on the basis of language in a statute without any affirmative governmental act limiting a person's liberty creates disincentives to states to provide important services to their citizens.

This Court identified in *Sandin* two undesirable effects of focusing on the language of a statute or regulation when determining whether a protected constitutional right exists. One effect was the disincentives that it creates for states to codify prison management procedures in the interest of uniform treatment. *Sandin*, 115 S. Ct. at 2299. Simply put, the potential liability that could result from such statutes or regulations could outweigh the benefits. The result reached by the Eighth Circuit in this case has the same potentially devastating negative consequences.

The services provided to the patient in this case were not ones to which she was constitutionally entitled. Petition, § II. As other states have done, Missouri decided as a matter of state policy that it would provide the services. In light of the Eighth Circuit's decision, these states, like Missouri, might well think twice whether the new liability that they could be exposed to is sufficiently outweighed by the benefits of providing the services. Whatever short-term gains that might accrue to the plaintiffs in this case as a result of being allowed a cause of action could be dramatically dwarfed by the possible effects on the provision of services to other citizens. States should not be required to make such vital decisions until it is clear that the due process clause creates the right that the Eighth Circuit found. Review by this Court would clarify for states the possible consequences of legislative actions.

II.

The Eighth Circuit's decision employs a standard that could render the defense of qualified immunity virtually meaningless.

Decisions by this Court have uniformly held that state officials are entitled to qualified immunity unless their conduct violated a "clearly" established constitutional or statutory right. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Two attorneys, sitting as judges on a panel of the Eighth Circuit, held that it would have been apparent to state officials untrained in the law that voluntarily admitted patients are entitled to the protections of substantive due process even though the state had never acted affirmatively to limit the patient's liberty. They reached this conclusion even though no published opinion had ever employed the reasoning that they characterized as "not obscure" and even though the reasoning was obscure enough to evade the other member of the panel and the magistrate judge.

If allowed to stand, the Eighth Circuit's conclusion could render the defense of qualified immunity virtually meaningless. No longer would state officials be allowed to carry out their duties with the understanding that they would be protected from the burdens of litigation as long as their actions are reasonable. The Eighth Circuit's decision requires that they expect the unexpected. Review by this Court would clarify what is expected of a "reasonable" state official.

CONCLUSION

For the reasons stated above and in the petition, *amici* respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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